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No. 88-803

In the Supreme Court of the United States

OCTOBER TERM, 1988

GRANT ANTHONY, PETITIONER

v.

OTIS R. BOWEN, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that he is not a "prevailing party" entitled to an attorney's fee award under the fee-shifting provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), 2000e-16(d).

1. This is an attorney's fee case arising out of claims that the Department of Health and Human Services violated provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* On May 10, 1979, petitioner filed a formal administrative complaint with the Equal Employment Opportunity Commission (EEOC) alleging that his employer, the Department of Health and Human Services (HHS), had discriminated against him on the basis of race and sex in the application of its procedures

for special leave and in the denial of his requests for promotion (Pet. App. 7a). In its recommended disposition of these allegations, the EEOC concluded that there was reasonable cause to believe that the agency's application of its special leave policy to petitioner was racially motivated but found no probable cause to believe that the promotion decisions challenged in the complaint resulted from discrimination (*id.* at 8a).

On April 5, 1982, eight months after issuance of the EEOC report, HHS formally adopted the EEOC's findings and recommendations as its own (Pet. App. 9a). Petitioner then requested a hearing before an EEOC examiner on the promotion issue (*ibid.*). The hearing examiner subsequently remanded the complaint to HHS because it had failed to provide petitioner with a letter stipulating the issues accepted for investigation and because the examiner deemed HHS's preliminary investigation inadequate (*ibid.*). On remand, HHS indicated that it would (1) investigate the promotion decisions challenged in petitioner's formal complaint, (2) refuse to investigate other promotion decisions not explicitly challenged in petitioner's complaint, and (3) reopen for further investigation the issue of whether it had discriminated against petitioner in placing special restrictions on his use of leave (*id.* at 9a-10a).

On February 6, 1984, petitioner filed suit in district court to compel the agency to investigate additional promotion decisions beyond those expressly identified in the administrative complaint and to bar the agency from reopening the leave issue (Pet. App. 10a). He asserted jurisdiction under Title VII of the Civil Rights Act and sought relief under the Mandamus Act, 28 U.S.C. 1361, and the Declaratory Judgment Act, 28 U.S.C. 2201, 2202 (Pet. App. 11a-12a). He did not, however, seek to litigate the merits of the underlying Title VII complaint, which was

still pending before HHS at the time the district court rendered its decision (*id.* at 12a).

Without addressing the basis for its jurisdiction, the district court held that HHS could properly limit its investigation to those promotion decisions identified in the administrative complaint and the EEOC's recommended disposition. See *Anthony* v. *Bowen*, 674 F. Supp. 876, 878-880 (D.D.C. 1986). With respect to the leave issue, however, the court ruled for petitioner, holding that HHS could not conduct further administrative investigation on this matter because it had finally decided the question by adopting the EEOC's recommended disposition and had "issued as its own [the EEOC's] remedial order" (*id.* at 880).[1]

Petitioner appealed from the district court's determination that HHS need not expand its promotion investigation. In an unpublished memorandum opinion (App., *infra*, 1a-4a), the court of appeals reversed and remanded. The court maintained that employment discrimination complaints were to be broadly construed and that post-complaint evidence adequately apprised the agency of petitioner's intention to place in issue additional promotion decisions (*id.* at 3a). The court further noted that petitioner was not seeking adjudication of the merits of his underlying discrimination claim, and that his action did not arise under Title VII of the Civil Rights Act (App., *infra*, 4a). The court added that "[a]lthough the government has not raised the point by cross appeal, we have grave doubts whether the mandamus statute, 28 U.S.C. 1361, is properly deployed" for monitoring the agency's handling of the Title VII administrative complaint (*ibid.*).

[1] According to the district court, the agency agreed to "terminat[e petitioner's] leave status" and "require[ ] that [special leave] procedures be applied in a nondiscriminatory manner in the future" (674 F. Supp. at 880).

Thereafter, the government petitioned for rehearing on the ground that the district court lacked jurisdiction. That petition was denied (Gov't C.A. Br. 3 n.2).

2. Petitioner then moved in the district court for an award of attorney's fees under Title VII, or, alternatively, under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. On consideration of the request, the district court observed that petitioner had "prevailed on the merits of his claims that defendant could not reopen the leave issue previously decided in his favor, and that defendant was required to investigate the additional charges he wished to prosecute administratively" (Pet. App. 27a). Without citing the statutory basis for the award, the court concluded that petitioner had obtained "the full relief he sought in these judicial proceedings" (*id.* at 26a), and awarded him $40,645.75 in fees (*id.* at 29a-31a).

The court of appeals vacated the judgment and remanded for further proceedings (Pet. App. 5a-23a). As an initial matter, the court of appeals determined that the district court had implicitly awarded attorney's fees under the fee-shifting provisions of Title VII and not under EAJA (Pet. App. 18a).[2] The court then asserted that although the petitioner had achieved the object of his litigation—an order controlling the scope of the administrative investi-

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[2] As noted above, the district court did not specify the statutory basis of its award. The court of appeals reasoned, however, that (1) the district court had based the award on a fee rate of $150 per hour—in excess of EAJA's $75 per hour presumptive fee cap, (2) the district court, in determining fee entitlement, had discussed this Court's decision in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980)—a Title VII case, and (3) the district court failed to determine whether the government's conduct was "substantially justified"—a prerequisite to awarding fees under EAJA. See Pet. App. at 17a-18a, 22a-23a.

gation – he had not obtained a judicial decree concerning the underlying merits of his civil rights claims (*id.* at 18a-22a).[3] The court also reasoned that the petitioner could not claim to have "prevailed" on the merits of a claim arising under Title VII in an action maintained under the Mandamus Act (Pet. App. 18a-19a). Relying on this Court's opinion in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), the court concluded that the petitioner failed to satisfy Title VII's "prevailing party" requirement for the award of attorney's fees, 42 U.S.C. 2000e-5(k).[4]

The court further ruled that petitioner had succeeded on a significant issue in the litigation and had therefore prevailed for purposes of the fee-shifting provisions of EAJA (Pet. App. 16a, 22a). It therefore remanded the case for a determination of whether the government's position was "substantially justified" within the meaning of that statute (*id.* at 22a-23a). Petitioner now challenges the court of appeals' determination that he is not eligible for a fee award under Title VII.

3. The holding below is limited to the highly unusual facts and procedural posture of this case and arises out of the erroneous assumption of mandamus jurisdiction by the district court. For this reason, the case has little if any

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[3] The court rejected the contention that the mandamus order had conclusively disposed of any Title VII claims, explaining that "[t]he record contains no mention of the final disposition of Anthony's actual Title VII claims. We can only assume that investigation and resolution of those claims are not yet final" (Pet. App. 18a). See also *id.* at 21a-22a.

[4] This provision states that, "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person." Under 42 U.S.C. 2000e-16(d), this provision is made applicable to civil actions alleging discrimination in employment by the Federal Government.

prospective significance and does not warrant further review.

Petitioner asserts (Pet. 15) that success on the merits of his mandamus action entailed success on the merits of a Title VII claim. He maintains that the district court's order forbidding the reopening of HHS's investigation of the leave issue rendered final and conclusive HHS's adoption of the EEOC's finding of discrimination, and thus established his entitlement to relief under Title VII. The court of appeals disagreed with petitioner that the result of the district court action could be characterized as a final determination of this Title VII claim of discrimination in the granting of special leave. It also denied that petitioner could "prevail" in a discrimination claim within the meaning of the Title VII fee-shifting provision on the basis of success in an action brought under another statute.

The question whether petitioner could be considered to have "[ ]established [a] violation of Title VII * * * [and] his entitlement to the relief stated in the agency decision" (Pet. 15) through success in an action brought under the Mandamus Act does not warrant this Court's consideration. The issue pressed by petitioner is unlikely to recur with any frequency because it arises out of the district court's inappropriate assumption of mandamus jurisdiction over Title VII claims that were still pending before the administrative agency.

Although the court of appeals declined to reach the question of the district court's subject matter jurisdiction in the absence of a cross appeal by the government, it nonetheless expressed "grave doubts" as to whether the mandamus statute was a proper basis for district court jurisdiction in this case.[5] We submit that the court's

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[5] The court of appeals plainly could have addressed the issue of subject matter jurisdiction *sua sponte*—a fact that further emphasizes the

doubts were justified. Under well-established doctrine, mandamus jurisdiction is properly invoked only when no other adequate remedy is available and the petitioner would otherwise be prejudiced in a way not correctable on appeal. See, *e.g.*, *City of Highland Park* v. *Train*, 519 F.2d 681, 691 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976); *Council of and for the Blind* v. *Regan*, 709 F.2d 1521, 1533 (D.C. Cir. 1983) (*en banc*); *Levine* v. *U.S. District Court for the Central District of California*, 764 F.2d 590, 593 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986); see also *Ex parte Peru*, 318 U.S. 578, 584 (1943). Petitioner's case did not satisfy these conditions, as Title VII provided an adequate alternative remedy for any error committed by the agency in its consideration of petitioner's discrimination charge. Had HHS's investigation concerning special leave been reopened and the underlying matter resolved against petitioner, he could have asserted the illegality of the agency's decision to reopen in a Title VII lawsuit to review *de novo* the agency's final determination. See 42 U.S.C. 2000e-5(f)(1). Thus, an adequate statutory remedy to protect petitioner's rights was available under "the very statute that create[d] the rights." *City of Highland Park* v. *Train*, 519 F.2d at 692. Moreover, if petitioner had prevailed in his Title VII lawsuit, he would have obtained the same relief he obtained through success in his mandamus action. Accordingly, petitioner would have suffered no prejudice if the district court had refused to issue the writ.

Additionally, the use of this extraordinary writ to interfere with ongoing administrative proceedings, as occurred in this case, engenders unnecessary litigation and disrupts the administrative process. Interim actions that are not immediately reviewable on interlocutory appeal should not

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peculiar posture of this case and the limited prospective significance of the court's holding on petitioner's attorney's fee application.

be reviewed by means of the alternative device of mandamus. See *In re Special March 1974 Grand Jury*, 541 F.2d 166, 172 (7th Cir. 1976), cert. denied, 430 U.S. 929 (1977)) (mandamus relief denied where the plaintiff merely contested the procedural aspects of the ongoing grand jury investigation rather than the merits of his defense).

In light of the erroneous use of mandamus in this case, it is unlikely that a significant number of other cases will raise the question of whether a party who prevails in a mandamus action brought to enforce Title VII can be a prevailing party within the meaning of the statute's fee-shifting provisions. This case therefore does not present an issue of recurring, prospective significance that warrants further review. Moreover, petitioner may yet receive some reimbursement under EAJA for expenses incurred in the mandamus action. The fact that EAJA provides an alternative source of attorney's fees for the rare plaintiff who prevails in a mandamus action during the course of Title VII administrative proceedings further diminishes the importance of the question whether fees are available under Title VII in these circumstances.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1989

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5473
Civil Action No. 84-00385

GRANT ANTHONY, APPELLANT

v.

OTIS R. BOWEN, SECRETARY,
HEALTH & HUMAN SERVICES, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Mar. 5, 1987]

JUDGMENT

Before: RUTH B. GINSBURG and BUCKLEY, Circuit Judges, and FAIRCHILD, *Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

This appeal was considered on the record from the United States District Court for the District of Columbia and was briefed and argued by counsel. Upon review of the issues and arguments presented, the court concludes that the case occasions no need for a published opinion.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

See D.C. Cir. R. 13(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by this Court, that the orders from which this appeal has been taken be affirmed in part and reversed in part. The case is hereby remanded to the district court with instructions to return it to the agency so that Anthony may promptly receive a complete administrative ruling on the full (eighteen opportunity) discrimination claim he attempted to present. It is

FURTHER ORDERED, by this Court, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court
/s/ George A Fisher
GEORGE A. FISHER
Clerk

MEMORANDUM

The district court correctly observed that "complaints in employment discrimination cases are to be broadly construed." *Anthony v. Bowen*, No. 84-0385, slip op. at 6 (D.D.C. Apr. 25, 1986). It further recognized that issues raised at the pre-complaint counseling stage should not be read, automatically, into the formal administrative complaint because "[t]he whole purpose of requiring initial recourse to informal dispute resolution efforts is to eliminate or reduce the matter at issue before the formal administrative machinery is set in motion." *Id.* at 7. In this case, however, post-complaint evidence should have revealed to the agency that Anthony's formal complaint, filed May 10, 1979, was intended to place at issue his non-selection for eighteen "Stride" (training program) slots.

In an account of Anthony's formal complaint prepared August 9, 1979, for example, the EEO investigator acknowledged Anthony's protest that work evaluations unfairly describing his performance resulted in his non-selection "for any of the eighteen [Stride] positions." Joint Appendix (J.A.) at 103. This grievance, referring to eighteen slots, was essentially repeated in the November 2, 1979 *Statement of Allegations Made in a Federal Formal Complaint*, prepared by the EEO officer and signed by Anthony. J.A. at 106. This latter document also noted Anthony's concern that his non-selection for any of the eighteen Stride positions was related to the discriminatory application of special leave procedures to him. The agency was remiss in failing to recognize that the generous approach we apply to court complaints charging employment discrimination should hold as well for agency inspection of administrative complaints in this area. *See Brown v. Marsh*, 777 F.2d 8 (D.C. Cir. 1985); *President v. Vance*, 627 F.2d 353 (D.C. Cir. 1980). While a complainant in

Anthony's situation should not be indulged to the point of allowing him to resurrect a claim he deliberately abandoned, neither should he be stopped from pursuing a claim he stated comprehensibly, albeit without the cogency or art of an expert pleader. Where, as here, the complainant's allegations are discernible, the agency must attend to those allegations.

We note, further, that the district court was unquestionably correct in holding that the court complaint Anthony tendered did not arise under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* For reasons of economy, Anthony prefers to remain on an administrative track. He wants the court to monitor the agency's administrative performance, but not to take hold of the case for an adjudication on the merits of his race and sex discrimination in employment charges. Although the government has not raised the point by cross appeal, we have grave doubts whether the mandamus statute, 28 U.S.C. § 1361, is properly deployed for such monitoring. If the mandamus were appropriate, however, it should have extended to all eighteen Stride positions. Finally, we observe that the venue question debated when this case was new retains no vitality as the case is now postured. We therefore discard that issue as moot.

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